BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

DENNIS E. MCQUESTEN	)	
Claimant	)	
VS.	)	
	)	Docket Nos. 268,194 & 268,195
ELLSWORTH COUNTY	)	
Respondent	)	
AND	)	
	)	
EMC INSURANCE	)	
Insurance Carrier	)	

ORDER

Both parties appealed the May 12, 2004 Review & Modification and Post-Award Medical Award (Award) entered by Administrative Law Judge Bruce E. Moore. The Board heard oral argument on October 19, 2004.

APPEARANCES

James S. Oswalt of Hutchinson, Kansas, appeared for claimant. Richard L. Friedeman of Great Bend, Kansas, appeared for respondent and its insurance carrier (respondent).

RECORD AND STIPULATIONS

The record considered by the Board is listed in the Award. The parties' stipulations are listed in the May 3, 2002 Award that was initially entered in these claims.

ISSUES

In the May 12, 2004 Review & Modification and Post-Award Medical Award, the Judge addressed respondent's request to review and modify the initial award of permanent disability benefits entered in these claims, claimant's request for additional medical treatment, and claimant's request to review and modify the initial award.

In the initial award entered in these claims on May 3, 2002, the Judge determined the appropriate date of accident in both of these claims was July 25, 2000, and also

determined claimant had sustained a 10 percent whole body functional impairment due to his low back injury. In analyzing claimant's permanent disability for the period following November 29, 2001, the Judge found claimant had an 82 percent task loss and a post-injury wage of $187.50 per week, which created a 54 percent wage loss. Averaging the 54 percent wage loss and the 82 percent task loss, the Judge concluded claimant sustained a 68 percent work disability[1] for the period commencing November 29, 2001.[2]

Respondent appealed the May 3, 2002 Award to this Board, which affirmed that Award in its July 30, 2003 Order. On May 20, 2002, respondent filed an application to review and modify the initial award on the basis that claimant's post-injury wage had increased and claimant's permanent partial general disability had decreased. Later, claimant filed a request for additional medical benefits and even later filed a request to modify the initial award as he had been terminated by his subsequent employer, 7-Eleven.

In the May 12, 2004 Review & Modification and Post-Award Medical Award, Judge Moore found claimant's post-injury wage had increased to $288.14 and, therefore, claimant's wage loss for determining claimant's permanent partial general disability benefits had decreased from 54 percent to 30 percent. Accordingly, the Judge modified the initial award by reducing claimant's work disability from 68 percent to 56 percent effective June 1, 2002, when claimant apparently began receiving insurance benefits from his then employer 7-Eleven. The Judge also determined claimant was "entitled to medical expenses, and any unauthorized medical expenses if any" and "[f]uture medical will be considered upon proper application."[3]

Claimant contends Judge Moore erred. First, claimant argues his post-injury average weekly wage while working for 7-Eleven during his first six months of employment was $217.79, which then increased in June 2002, when, claimant contends, he began receiving fringe benefits, to either $266.62 per week[4] or $263.84 per week.[5] Claimant argued he only worked an average of 28.76 hours per week. Second, claimant argues he made a good faith effort to retain his job with 7-Eleven and, therefore, claimant contends

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[1] A permanent partial general disability determined under K.S.A. 44-510e that is greater than the functional impairment rating.

[2] At page 3 of the May 3, 2002 Award, the Judge concluded claimant's permanent partial general disability was 10 percent "between July 17, 2001 and July 31, 2001; 91% between July 31, 2001 and October 29, 2001; 69% between October 29, 2001 and November 29, 2001, and 68% thereafter."

[3] ALJ Award (May 12, 2004) at 11.

[4] Claimant's Brief at 8 (filed Jan. 2, 2004).

[5] Claimant's Brief at 4, 6 (filed June 25, 2004).

he has a 100 percent wage loss commencing December 19, 2002, when 7-Eleven terminated him. In the alternative, claimant contends he has a 100 percent wage loss commencing January 14, 2003, as his authorized treating doctor, Dr. Carlos A. Botero, took him off work on that date. Third, claimant argues the Judge overlooked and failed to address the request for payment of the medical and drug prescription expenses that he incurred after moving to Florida. And finally, claimant contends the Judge erred by requiring him to apply for future medical treatment rather than permitting him to see a doctor on an ongoing basis.

In short, claimant requests this Board to modify the initial award by finding a post-injury average weekly wage of $263.84, which would create a 36 percent wage loss and a 59 percent work disability for the period through his termination on December 19, 2002, followed by a 100 percent wage loss and a 91 percent work disability. In addition, claimant requests the Board to order respondent to pay the medical expense incurred with Dr. Botero and any related drug prescription expense as authorized medical expense. Finally, claimant requests the Board to grant him ongoing medical benefits.

Respondent also contends Judge Moore erred. Respondent contends claimant's new post-injury wage should be computed following the formula for a full-time employee and, therefore, his straight time wage should be based upon a 40-hour workweek. Respondent argues claimant's post-injury average weekly wage is $348.83, which includes $300 per week in straight time wages ($7.50 per hour x 40 hours per week) plus $48.83 in fringe benefits. Accordingly, respondent argues the initial award should be modified to reflect a 15 percent wage loss, which would create an approximate 49 percent work disability. Moreover, respondent argues claimant's termination by 7-Eleven does not reduce his post-injury wage as claimant was terminated due to his willful acts and, therefore, the wage that he was earning at the time of his termination should be imputed for purposes of the permanent partial general disability formula.

The issues before the Board on this appeal are:

1. What is claimant's post-injury average weekly wage for purposes of the permanent partial general disability formula for the period that he was employed by 7-Eleven?

2. What is claimant's post-injury average weekly wage for purposes of the permanent partial general disability formula commencing December 19, 2002, which is the date 7-Eleven terminated claimant?

3. Should the initial award be modified and, if so, what is the effective date of the modification?

4. Is claimant entitled to an award for the outstanding medical bills with Dr. Carlos A. Botero and any related treatment or prescription drug expense?

5. Should claimant be allowed to receive additional medical treatment from Dr. Botero without first filing and processing an application for such additional treatment with the Division of Workers Compensation?

FINDINGS OF FACT

After reviewing the entire record and considering the parties' arguments, the Board finds:

1. Claimant injured his back on July 25, 2000, while working for respondent. Due to that accident, claimant underwent a two-level anterior interbody cage fusion and posterior instrumented fusion at the fourth and fifth lumbar and first sacral intervertebral levels. Dr. Glenn M. Amundson, who performed the back surgery, released claimant from treatment in August 2001 with permanent work restrictions.

2. On May 3, 2002, Judge Moore issued an Award finding claimant had a 68 percent work disability, which was based upon a 54 percent wage loss and an 82 percent task loss for the period commencing November 29, 2001. In that Award, the Judge found claimant commenced working at a convenience store in Florida on October 29, 2001, and that his post-injury earnings were $187.50 per week, commencing November 29, 2001. The May 3, 2002 Award reads, in part:

> Claimant began work for a 7-Eleven store in Plant, Florida on October 29, 2001, working 25 to 30 hours per week at $7.25 per hour with no benefits. After 30 days, his wages were to increase to $7.50 per hour, again working 20 to 30 hours per week. Utilizing an average 25-hour work week, Claimant's average weekly wage from October 29, 2001 to November 29, 2001 were *[sic]* $181.25, a 56% reduction from his pre-injury weekly wage of $409.53. From and after November 29, 2001, Claimant's earnings were $187.50, a 54% reduction from his pre-injury earnings.[6]

3. After claimant moved to Florida, he began seeing Dr. Carlos A. Botero, who is board-certified in anesthesiology and pain management. In October 2001, when claimant first saw Dr. Botero, the doctor diagnosed chronic back pain, lumbar radiculitis, and failed back surgery. The doctor prescribed opiates and, consequently, began seeing claimant on a monthly basis.

[6] ALJ Award (May 3, 2002) at 7.

4. In January 2002, Dr. Botero recommended epidural steroid injections. But those were not done as claimant could not afford the expense. At a February 13, 2002 visit, Dr. Botero noted claimant was very drowsy and, therefore, modified his medications. At that visit, the doctor noted claimant was unable to work and also unable to drive. In March 2002, the doctor noted claimant's pain had increased and, coincidentally, that claimant had advised he was unable to afford the prescribed medications. When claimant next saw the doctor in April 2002, Dr. Botero insisted claimant undergo epidural steroid injections. But claimant again advised the doctor he could not afford the expense.

5. On May 1, 2002, 7-Eleven began providing claimant fringe benefits that cost the company $48.14 per week.[7]

6. As indicated above, the Judge entered the initial final Award on May 3, 2002. And on May 20, 2002, respondent filed an application to review and modify that Award, alleging claimant's work disability had decreased.

7. Meanwhile, claimant continued to see Dr. Botero and at their visit in June 2002 claimant reported increased pain. In July 2002, claimant reported severe pain and the doctor once again recommended epidural injections. When claimant saw the doctor on September 30, 2002, Dr. Botero restricted claimant from working more than 20 hours per week and lifting more than 10 pounds. Following that visit, on October 17, 2002, claimant filed an application in these claims for additional medical treatment.

8. When claimant saw Dr. Botero on December 3, 2002, claimant's condition had deteriorated as he was experiencing increased pain and muscle spasms.

9. On December 13, 2002, claimant appeared before Judge Moore in a hearing to address respondent's request to review and modify the May 3, 2002 Award and to address claimant's request for additional medical treatment. At that time, claimant was continuing to work for 7-Eleven as a sales associate. At the hearing, claimant testified he was working only 20 hours per week but that he had averaged working 25 hours per week for the year. Claimant further testified he would experience increased back pain working for 7-Eleven after standing for an hour and a half to two hours without a break. Claimant also testified he was taking several medications, including OxyContin, Methadone, Neurontin, and ibuprofen. At the

[7] McQuesten Depo. (July 15, 2003), Ex. 4.

December 2002 hearing, claimant testified he had received two epidural injections from Dr. Ana Lipson.

10. Following the December 2002 hearing, claimant returned to Florida. Claimant was terminated on December 19, 2002, after prematurely leaving an interview that was being conducted by 7-Eleven related to shortages at the store where claimant worked. According to 7-Eleven's Kari Watson, who was present at the interview, claimant was being questioned about a refund that he had given his wife (who was a coworker) when claimant terminated the interview by walking out. But claimant was never accused of, or charged with, theft. Moreover, according to respondent's human resources generalist, Norm Kujawa, respondent's human resources records do not reflect that claimant was suspected of theft. Conversely, those records indicate claimant voluntarily quit and that he is eligible for being rehired. And Phillip Toye, who is 7-Eleven's marketing manager, testified it is standard policy to fire an employee who walks out of an interview as the company considers the employee to have voluntarily quit. Mr. Toye also testified claimant is eligible for being rehired but only after his former supervisor is contacted.

11. Both claimant and his former immediate supervisor, Ricann Hunt, described claimant's termination somewhat differently. According to Ms. Hunt, claimant was suspected of theft and she had been advised before his interview that 7-Eleven was going to terminate him. Ms. Hunt also testified one of her supervisors told her claimant was not eligible to be rehired. Claimant, on the other hand, testified that he had to stand after approximately 15 minutes into the interview and that he left only after he was rudely ordered to sit down. According to claimant, he later spoke with Mr. Toye about the interview and Mr. Toye advised claimant he was terminated. Claimant testified about the questionable refund, in part:

> Q. (Mr. Oswalt) And what did you do next?
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> A. (Claimant) They claim that I took it [a Tampa Bay Buccaneers flag] over to the register, voided it out, and put it back on the shelf.
>
> Q. Did you do that?
>
> A. Yes, sir.
>
> Q. And can you tell me why you did that?
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> A. Because earlier a customer had come in and purchased about $80 worth of Buccaneer souvenirs, and when he left, he got his banner but forgot his flag. He came back on my shift and told me about it, which he was a regular customer. So I told him to go ahead

> and take a flag. I was busy at the time. And he went ahead and got a flag off the shelf and took it.
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> So then when I got unbusy about an hour later, I called the assistant manager who was going to be there the next day, and I told him what I did. He said I needed to get a flag off the shelf, void it out, write him a note to remind him what I did, and he would take care of it. And that's exactly what I did.[8]

Mr. Toye testified he does not remember claimant calling around the time of the interview and only vaguely remembers claimant walking out of the interview. In any event, December 19, 2002, was the last day claimant was employed by 7-Eleven.

12. When claimant saw Dr. Botero on January 14, 2003, the doctor restricted claimant from working as he was in severe pain. Claimant has not sought work since.

13. On May 27, 2003, claimant filed an application to review and modify the May 3, 2002 Award, alleging he was unemployed, unable to find work, and had suffered additional wage loss.

14. When Dr. Botero testified in these claims on June 9, 2003, the doctor stated claimant should not be working. Dr. Botero testified, in part:

> Q. (Mr. Oswalt) You took him off work at that date. Had that ever changed? Is that still your current opinion?
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> A. (Dr. Botero) That's my current impression. He shouldn't work. He's not able to stand or sit or walk for long periods of time. He is not able to lift anything heavier than ten pounds and his spinal *[sic]* retention *[sic]* has also decreased.
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> Mr. McVay: Can you speak up?
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> A. The attention span has also decreased because of the pain. He is always thinking about the pain. It's hard to get out of his mind. It is severe enough that he isn't going to be able to function from the psychological or functioning standpoint.[9]

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[8] McQuesten Depo. (Nov. 11, 2003) at 10-11.

[9] Botero Depo. at 19-20.

15. According to Dr. Botero, who had seen claimant almost monthly from October 2001 through May 2003, claimant needed additional tests such as an MRI, CT scan, or myelogram. Dr. Botero concluded claimant would need to take opiates for the rest of his life, but that claimant also needed some procedure to reduce his pain such as epidurals or, most likely, a spinal cord stimulator or morphine pump. According to Dr. Botero, claimant might be able to work 20 hours per week if he could change positions frequently and limit his lifting. The doctor also doubted claimant's ability to perform work involving major mental activities due to the opiates he was taking and the resulting drowsiness. Dr. Botero testified, in part:

> If he [claimant] could change positions very frequently and he cannot lift any weight heavier than ten pounds and he could work twenty hours a week, that would be the maximum he could be able to work. However, I think it's going to be difficult for him, but I think that would be the maximum he could do.
>
> . . . .
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> He had a lot of problems with the medications. He had drowsiness. Even though he is much better and he can function, he still has some depression and he has constant pain that's fixed in his mind. He is not able to function very well due to that.[10]

16. At respondent's request, claimant's back surgeon, Dr. Amundson, saw claimant on June 6, 2003, to evaluate his present medical condition. Claimant demonstrated slightly "more paravertebral muscle tone that would go along with low back stiffness and with guarding spasm."[11] But claimant's neurologic function appeared relatively normal. After requesting and reviewing the results from a recent MRI and electrodiagnostic studies, Dr. Amundson concluded there was no objective evidence that claimant's condition had changed. The doctor concluded, however, claimant's symptoms were worse due to "activity-related irritation."[12] Consequently, Dr. Amundson determined that claimant's permanent work restrictions should be modified to further limit his lifting and further limit his standing. The doctor testified, in part:

> Q. (Mr. McVay) In other words, basically -- and if I'm wrong tell me -- basically his subjective complaints are worse so therefore you

[10] *Id.* at 23.

[11] Amundson Depo. (Oct. 15, 2003) at 5.

[12] *Id.* at 11.

> thought, since you believe it, you believe that he should have more restrictions?
>
> A. (Dr. Amundson) Correct. Which basically is dropping his lifting and carrying capacity from a light to a sedentary to light level, and most importantly, what seemed to be most aggravating in his mind on history, was reducing him from standing frequently to standing occasionally.[13]

Despite the additional work restrictions, Dr. Amundson believes claimant retains the ability to perform the work that he was performing for 7-Eleven as a sales associate and that he should be able to work on a full-time basis, or eight hours per day.

CONCLUSIONS OF LAW

Because claimant injured his back, which is not addressed by the scheduled injury statute,[14] claimant's permanent disability benefits are governed by K.S.A. 44-510e, which provides, in part:

> Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d and amendments thereto. **The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury.** In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein. An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury. (Emphasis added.)

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[13] *Id.* at 11.

[14] K.S.A. 44-510d.

But that statute must be read in light of *Foulk*[15] and *Copeland*.[16] In *Foulk*, the Kansas Court of Appeals held that a worker could not avoid the presumption against work disability as contained in K.S.A. 1988 Supp. 44-510e (the predecessor to the above-quoted statute) by refusing to perform an accommodated job, which the employer had offered. And in *Copeland*, the Kansas Court of Appeals held, for purposes of the wage loss prong of K.S.A. 44-510e (Furse 1993), that a worker's post-injury wage should be imputed based upon the ability to earn wages when the worker failed to make a good faith effort to find appropriate employment.

> If a finding is made that a good faith effort has not been made, the factfinder *[sic]* will have to determine an appropriate post-injury wage based on all the evidence before it, including expert testimony concerning the capacity to earn wages. . . .[17]

The Kansas Court of Appeals in *Watson*[18] held that the failure to make a good faith effort to find appropriate employment does not automatically limit the permanent partial general disability to the functional impairment rating. Instead, the Court reiterated that an imputed post-injury wage should be based upon all the evidence, including expert testimony concerning the worker's retained capacity to earn wages.

> In determining an appropriate disability award, if a finding is made that the claimant has not made a good faith effort to find employment, the factfinder *[sic]* must determine an appropriate post-injury wage based on all the evidence before it. This can include expert testimony concerning the capacity to earn wages.[19]

1. What is claimant's post-injury average weekly wage for purposes of the permanent partial general disability formula for the period that he was employed by 7-Eleven?

In the May 3, 2002 Award, the Judge specifically found claimant's post-injury average weekly wage was $181.25 from October 29, 2001, to November 29, 2001, which created a 56 percent wage loss for the permanent partial general disability formula. The Judge further found that claimant's post-injury average weekly wage commencing

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[15] *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

[16] *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

[17] *Id.* at 320.

[18] *Watson v. Johnson Controls, Inc.*, 29 Kan. App. 2d 1078, 36 P.3d 323 (2001).

[19] *Id.* at Syl. ¶ 4.

November 29, 2001, was $187.50, which created a 54 percent wage loss considering claimant's $409.53 average weekly wage on the date of accident. Those findings were affirmed on appeal.

The Workers Compensation Act utilizes a worker's post-injury earnings in determining a worker's permanent partial general disability benefits. Unfortunately, those earnings might change on a weekly basis. The Board does not believe the legislature intended the parties to review and modify an award every instance the worker's post-injury wages fluctuated. Conversely, the Board believes the legislature intended that permanent partial general disability benefits should be based upon a reasonable representation of the worker's post-injury earnings. For example, if a worker's post-injury earnings fluctuated from week to week, the wage loss percentage and, thus, the permanent partial general disability percentage, would vary from week to week. Modifying an award on a weekly basis due to those fluctuations, however, is not reasonable. On the other hand, the Board believes the legislature intended review and modification to be utilized when there is a significant change or event.

The record establishes several significant events that justify reviewing claimant's permanent partial general disability. The first event occurred in May 2002 when claimant began receiving insurance benefits from 7-Eleven. The second event occurred on September 30, 2002, when Dr. Botero restricted claimant from working more than 20 hours per week and from lifting more than 10 pounds. The third significant event occurred on December 19, 2002, when 7-Eleven terminated claimant. And, finally, the last event occurred on January 14, 2003, when Dr. Botero restricted claimant from working.

At claimant's July 15, 2003 deposition, the parties entered claimant's wage records from 7-Eleven. Exhibit 4 from that deposition shows claimant's wages commencing with his hiring in October 2001 through the end of his employment with 7-Eleven in December 2002. That exhibit also indicates 7-Eleven provided claimant with medical insurance benefits that cost the employer $46.39 per week and dental insurance benefits that cost the employer $1.75 per week. The cost of those medical and dental benefits totals $48.14.

Considering the entire record, the Board concludes claimant was employed as a part-time hourly employee, as that phrase is defined by the Workers Compensation Act.

> The term "part-time hourly employee" shall mean and include any employee paid on an hourly basis: (A) Who by custom and practice or under the verbal or written employment contract in force at the time of the accident is employed to work, agrees to work, or is expected to work on a regular basis less than 40 hours per week; and (B) who at the time of the accident is working in any type of trade or

> employment where there is no customary number of hours constituting an ordinary day in the character of the work involved or performed by the employee.[20]

Claimant's testimony is persuasive that 7-Eleven hired him as a part-time worker and that he only worked 40 or more hours a week on a very limited basis. The wage records introduced at claimant's July 15, 2003 deposition show the total number of hours worked for each two-week pay period that claimant was employed by 7-Eleven. Although the records do not break down the hours claimant worked each week, the records do establish that claimant did not regularly average more than 40 hours per week. Consequently, the Board finds claimant was employed to work and was expected to work on a regular basis less than 40 hours per week.

For purposes of the permanent partial general disability formula, the Board finds claimant's post-injury average weekly wage while working for 7-Eleven from October 2001 through April 2002, was approximately $250.07. That sum was computed by averaging claimant's earnings as shown in the 7-Eleven wage records for the period from October 29, 2001, through April 2002, before he began receiving fringe benefits.

Claimant's post-injury average weekly wage increased once he began receiving fringe benefits from 7-Eleven. Consequently, commencing May 1, 2002, claimant's post-injury average weekly wage equaled $275.04, which is $226.90, the approximate weekly pay claimant received between May 1, 2002, and September 30, 2002 (the date Dr. Botero further restricted claimant's work activities), plus $48.14 for fringe benefits.

The next significant event relative to claimant's work and his post-injury earnings occurred on September 30, 2002, when Dr. Botero restricted claimant from working more than 20 hours per week. Using the 7-Eleven earnings records, claimant earned approximately $124.61 per week from October 1, 2002, to his termination on December 19, 2002. Adding that sum to claimant's $48.14 for fringe benefits equals $172.75 per week. Consequently, for the period from October 1, 2002, to December 19, 2002, claimant's post-injury average weekly wage for the permanent partial general disability formula is $172.75.

2. What is claimant's post-injury average weekly wage for purposes of the permanent partial general disability formula commencing December 19, 2002, when 7-Eleven terminated claimant?

Claimant's termination by 7-Eleven shaped the next significant event for determining claimant's post-injury wage and permanent partial general disability.

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[20] K.S.A. 44-511(a)(4).

For the period following December 19, 2002, the Board concludes that a post-injury wage should be imputed. The Board agrees with Judge Moore that claimant's explanation of the refund transaction was questionable. Claimant's testimony that he followed the refund procedure as directed by one of his assistant managers, however, is uncontradicted. More importantly, whether or not claimant made a questionable refund is not determinative as he was not terminated due to that transaction or for theft.

Instead, the critical issue is whether claimant's refusal to participate in 7-Eleven's investigation and interview process was tantamount to failing to make a good faith effort to retain an accommodated job, thus violating the principles of *Foulk*. The Board is not persuaded by claimant's explanation that he left the interview due to his back symptoms. The Board finds claimant left the interview when 7-Eleven's representatives began to ask claimant about the questionable refund.

The Board concludes claimant did not cooperate with 7-Eleven's theft investigation and that his prematurely terminating the interview constituted a lack of a good faith effort to retain appropriate employment. Accordingly, a post-injury wage should be imputed based upon the wages that claimant was earning working for 7-Eleven at the time of his termination. Therefore, $172.75 is designated as claimant's post-injury average weekly wage for the period commencing December 19, 2002.

The last significant event in the record occurred on January 14, 2003, when Dr. Botero restricted claimant from working due to claimant's severe pain. Dr. Botero is claimant's authorized treating physician. The doctor is very knowledgeable of claimant's condition as he has treated claimant since October 2001. The Board is persuaded by the doctor's opinion that claimant was unable to work as of January 14, 2003. Accordingly, the Board concludes claimant is entitled to receive temporary total disability benefits commencing that date.

3. Should the May 3, 2002 Award be modified and, if so, what is the effective date of the modification?

The May 3, 2002 Award should be modified to reflect the several changes in claimant's post-injury wages.

Respondent filed its request to review and modify the May 3, 2002 Award on May 20, 2002. When an award is modified due to a change in either the functional impairment or work disability, the Workers Compensation Act provides that the effective date of the modification shall be the date the change occurred, except the effective date of the modification cannot revert back more than six months before the application for review and

modification was filed.[21] Consequently, the earliest effective date that the May 3, 2002 Award can be modified is November 20, 2001.

Accordingly, the May 3, 2002 Award should be modified, as follows:

> Commencing November 20, 2001, claimant's permanent partial general disability is 61 percent, which is based upon a post-injury average weekly wage of $250.07, a wage loss of 39 percent, and his 82 percent task loss (as determined in the initial award).
>
> Commencing May 1, 2002, claimant's permanent partial general disability is 58 percent, which is based upon a post-injury average weekly wage of $275.04, a wage loss of 33 percent, and his 82 percent task loss.
>
> Commencing October 1, 2002, claimant's permanent partial general disability is 70 percent, which is based upon a post-injury average weekly wage of $172.75, a wage loss of 58 percent, and an 82 percent task loss.
>
> And commencing January 14, 2003, claimant is entitled to temporary total disability benefits.

4. Is claimant entitled to an award for the outstanding medical bills with Dr. Carlos A. Botero and any related treatment or related prescription drug expense?

Respondent does not dispute that it authorized Dr. Botero to treat claimant. By Order dated July 29, 2003, Judge Moore designated Dr. Botero as claimant's treating physician "pursuant to Respondent's letter to Claimant of December 24, 2002." Moreover, respondent noted Dr. Botero was authorized to treat claimant in its April 19, 2004 submission letter to Judge Moore. In that letter, respondent's attorney wrote, in part:

> Relative to the request for post award medical, Dr. Botero is authorized. We are not sure what more is necessary.[22]

Accordingly, respondent should reimburse or pay any outstanding authorized medical expense, including drug prescription expense, incurred by claimant with Dr. Botero or his referrals.

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[21] See K.S.A. 44-528(d).

[22] Respondent's Brief at 3 (filed Apr. 19, 2004).

5. Should claimant be allowed to receive additional conservative medical treatment from Dr. Botero without first filing and processing an application for such additional treatment with the Division of Workers Compensation?

Dr. Botero testified claimant needs ongoing prescription medications due to his back injury. Those medications require regular monitoring. Accordingly, claimant should be entitled to receive ongoing conservative medical treatment from an authorized health care provider without being required first to request permission from respondent or to pursue an application for additional medical treatment with the Division of Workers Compensation.

AWARD

WHEREFORE, the Board modifies the May 12, 2004 Review & Modification and Post-Award Medical Award entered by Judge Moore as follows:

Dennis E. McQuesten is granted compensation from Ellsworth County and its insurance carrier for a July 25, 2000 accident and resulting disability. Based upon an average weekly wage of $409.53, Mr. McQuesten is entitled to receive 30.04 weeks of temporary total disability benefits at $273.03 per week, or $8,201.82.

For the period ending July 30, 2001, 22.86 weeks of benefits are due at $273.03 per week, or $6,241.47, for a 10 percent permanent partial general disability.

For the period from July 31 2001, through October 28, 2001, 12.86 weeks of benefits are due at $273.03 per week, or $3,511.17, for a 91 percent permanent partial general disability.

For the period from October 29, 2001, through November 19, 2001, 3.14 weeks of benefits are due at $273.03 per week, or $857.31, for a 69 percent permanent partial general disability.

For the period from November 20, 2001, through April 30, 2002, 23.14 weeks of benefits are due at $273.03 per week, or $6,317.91, for a 61 percent permanent partial general disability.

For the period from May 1, 2002, through September 30, 2002, 21.86 weeks of benefits are due at $273.03 per week, or $5,968.44, for a 58 percent permanent partial general disability.

For the period from October 1, 2002, through January 13, 2003, 15 weeks of benefits are due at $273.03 per week, or $4,095.45, for a 70 percent permanent partial general disability.

And commencing January 14, 2003, Mr. McQuesten is entitled to receive temporary total disability benefits at $273.03 per week.

The total award shall not exceed $100,000.

As of December 20, 2004, Mr. McQuesten is entitled to receive 131.04 weeks of temporary total disability compensation at $273.03 per week in the sum of $35,777.85, plus 98.86 weeks of permanent partial general disability compensation at $273.03 per week in the sum of $26,991.75, for a total due and owing of $62,769.60, which is ordered paid in one lump sum less any amounts previously paid. Mr. McQuesten shall be paid $273.03 per week until further order.

The Board adopts the remaining orders set forth in the May 12, 2004 Review & Modification and Post-Award Medical Award that are not inconsistent with the above.

IT IS SO ORDERED.

Dated this ____ day of December 2004.

_____
BOARD MEMBER

_____
BOARD MEMBER

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BOARD MEMBER

c: James S. Oswalt, Attorney for Claimant
Richard L. Friedeman, Attorney for Respondent and its Insurance Carrier
Bruce E. Moore, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director